(1)

91-311

No. 91-

In the Supreme Court of the United States

October Term, 1991

RAYMOND MIRELES,

Petitioner,

v.

HOWARD WACO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a judge who directs police officers to bring an attorney of record in a case pending on the court's calendar before that court from another location in the courthouse exercise a judicial function within the court's jurisdiction which is absolutely immune from suit pursuant to 42 U.S.C. § 1983 under *Stump v. Sparkman*, 435 U.S. 349 [98 S.Ct. 1099, 55 L.Ed.2d 331] (1978)?

2. Do allegations that a judge acted unreasonably in conducting the court's proceedings in a pending case destroy the judge's absolute immunity under *Bradley v. Fisher*, 13 Wall. 335, 202 Ed. 646 (1872) as applied to § 1983 actions in *Stump v. Sparkman*?

LIST OF PARTIES

Petitioner: RAYMOND MIRELES—Defendant-Appellee *Waco v. Baltad*, 934 F.2d 214 (CA9 1991), United States Court of Appeals Ninth Circuit No. 90-55683; *Waco v. Baltad, et al.*, United States District Court Central District of California No. CV 89-6970-TSH. Petitioner is a judge of the Superior Court of the State of California for the County of Los Angeles.

Respondent: HOWARD WACO—Plaintiff-Appellant *Waco v. Baltad*, 934 F.2d (CA9 1991), United States Court of Appeals Ninth Circuit No. 90-55683; *Waco v. Baltad, et al.* United States District Court Central District of California No. CV-89-6970-TSH. Respondent is a Los Angeles County Deputy Public Defender.

While two additional defendants are parties to action No. 89-6970-TSH on file in the United States District Court for the Central District, they were not parties to the proceeding in the United States Court of Appeals for the Ninth Circuit of California, those defendants are Gregory Baltad and Nicholas Titiriga, officers of the Los Angeles Police Department.

No corporation is a party to the proceedings.

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No. 91-

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND MIRELES hereby respectfully petitions the United States Supreme Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit filed in this action on May 24, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in the official reports as *Waco v. Baltad*, 934 F.2d 214 (CA9 1991) and is contained in the Appendix hereto at pages A 1-5. The Federal District court issued no written opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered May 24, 1991. This petition is filed within ninety (90) days of that judgment. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case:

Title 42, United States Code, section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Constitution, Article VI, section 10:

> Superior courts have original jurisdiction in all causes except those given by statute to other trial courts.

California Code of Civil Procedure, section 187:

> When jurisdiction is, by the Constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

California Code of Civil Procedure, section 128:

> (a) Every court shall have the power to do all of the following:
>
> (1) To preserve and enforce order in its immediate presence.
>
> (2) To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.
>
> (3) To provide for the orderly conduct of proceedings before it, or its officers.
>
> (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein.
>
> (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto
>
> . . .

California Code of Civil Procedure, section 177:

> Every judicial officer shall have power:
>
> (1) To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;

(2) To compel obedience to his lawful orders as provided in this code . . .

STATEMENT OF THE CASE

On December 4, 1989, HOWARD WACO, a Los Angeles County Deputy Public Defender, filed a complaint in the United States District Court for the Central District of California naming as defendants, RAYMOND MIRELES, a Judge of the Superior Court of the State of California for the County of Los Angeles, individually, and two officers of the Los Angeles Police Department. (App. B 1-7.) The complaint alleged a single claim for relief under 42 U.S.C. § 1983 and averred jurisdiction pursuant to 28 U.S.C. § 1343(a)(4). (App. B-1)

The complaint further alleged that on November 6, 1989, the defendant officers were present in Judge MIRELES's courtroom as witnesses in a criminal matter set for hearing on the court's morning calendar in which WACO was counsel of record for Johnny Lee Smith. (App. B 3-4) Specifically as to Petitioner MIRELES, WACO asserted the judge "ordered [the officers] to forcibly and with excessive force seize and bring plaintiff to his courtroom." (App. B-3) WACO's complaint also alleged that at the time he was down the hall in another courtroom. (App. B-4) According to the complaint, the officers complied with the alleged order and Judge MIRELES ratified their acts. (App. B-4)

Judge MIRELES moved the Federal District Court to dismiss the action against him for failure to state a claim upon which relief could be granted pursuant to Federal Rules of Civil Procedure, rule 12(b)(1) and (6). The Federal District Court judge assigned to the matter, the Honorable Terry J. Hatter, granted that motion March 23, 1990. (App. C 1-3) Pursuant to a

motion by WACO, Judge Hatter ordered the dismissal be entered as a final judgment in favor of MIRELES on April 22, 1990 in accord with Federal Rules of Civil Procedure, rule 54(b). (App. D 1-3)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *BRADLEY V. FISHER*, *STUMP V. SPARKMAN* AND THE PRINCIPLE OF ABSOLUTE IMMUNITY FROM SUIT UNDER § 1983.

Despite more than a century of settled law, the Ninth Circuit has permitted a lawsuit against a judge who in a usual exercise of judicial authority ordered police officers to bring counsel of record before the court for a proceeding scheduled on its calendar. The opinion, declaring the novel proposition that a judge "can lose his immunity," strips the judge of his absolute immunity without engaging in the analysis prescribed by this Court as to whether the judge acted within his jurisdiction. By so holding, the opinion abrogates the controlling case law on absolute judicial immunity. Such an approach impermissibly renders absolute immunity conditional.

Since 1872, it has been the rule that judges are entitled to absolute immunity from civil lawsuits. *Bradley v. Fisher*, 13 Wall. 335, 351 [20 L.Ed. 646] (1872). That rule was expressly reaffirmed in the context of actions for damages under 42 U.S.C. § 1983 in *Stump v. Sparkman*, 435 U.S. 349 [98 S.Ct. 1099, 55 L.Ed.2d 331] (1978). This Court directed:

> "the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him." *Id.* at 356.

The sole issue is the complete absence of jurisdiction. *Bradley* was explicit in declaring that acts "alleged to have been done maliciously or corruptly" are immune. *Bradley, supra*, 13 Wall. at 347. *Stump* adopted *Bradley's* mandate without qualification. *Stump, supra*, 435 U.S. at 356. Both *Bradley* and *Stump* hold the judge's state of mind is irrelevant to the requisite jurisdictional analysis:

> "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' " *Id.* at 356-57 (quoting *Bradley, supra*, 13 Wall. at 351); *Bradley, supra*, 13 Wall at 347.

The Ninth Circuit's decision in this case directly contradicts the rule of *Bradley* and *Stump*. Relying only on the complaint's allegations as to the manner in which the judge issued his order, the court held WACO stated a claim. (App. A-5) The failure of the Court of Appeal to address the threshold issue of whether the judge's act was within his jurisdiction, not only contradicts *Stump* and *Bradley*, but this Court's most recent statement of the doctrine of judicial immunity in *Forrester v. White*, 484 U.S. 219 [108 S.Ct. 538, 98 L.Ed.2d 555] (1988). *Forrester* reaffirmed that an act within the court's jurisdiction "does not become less judicial by virtue of an allegation of malice or corruption

of motive." *Id.* at 227 (citing *Bradley*, *supra*, 13 Wall. at 354). *Forrester* also observed the informal or *ex parte* nature of a proceeding does not deprive an act otherwise within a judge's jurisdiction of its judicial character. *Forrester*, *supra*, 484 U.S. at 227.

The California Constitution together with the state statutory scheme confer wide-reaching jurisdiction upon the Superior Court. Article VI, section 10 of the state constitution provides: "Superior courts have original jurisdiction in all causes except those given by statute to other trial courts." The state legislature has granted judges broad authority to enforce order in their courtrooms, provide for the orderly conduct of proceedings, and compel obedience to their judgments, orders and process. Cal. Code. Civ. Proc. §§ 128(a), 177. That legislature has also bestowed upon judges comprehensive powers to exercise this control: "any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." Cal. Code Civ. Proc. § 187.

Given the broad jurisdictional powers of California judges to control the orderly conduct of proceedings held before them and compel obedience to their orders and process, it may not be reasonably argued Judge MIRELES acted in the clear absence of all jurisdiction. In fact, the Ninth Circuit opinion does not even purport to so conclude and engages in no analysis from which it could make such a determination. WACO, himself, makes no allegation the judge was not acting within his jurisdiction. The allegation against Judge MIRELES is only that he acted unreasonably in making his order because it directed the officers to bring WACO into the courtroom using "excessive force." Accepting WACO's allegation as true for pleading purposes the opinion

asserts, without explanation, WACO could prove the judge acted outside his "judicial capacity." (App. A-5)

Such a conclusion defies the prescribed analysis integral to the determination of whether or not the doctrine of judicial immunity applies. Where a court has jurisdiction to issue an order in performance of its function as adjudicator of matters before it, including the management of its calendar and counsel representing the parties before the court, it cannot be said the judge lacks judicial capacity or that his acts may be converted to non-judicial status. *Bradley*, *supra*, 13 Wall. at 357; *Stump*, *supra*, 435 U.S. at 359; *Forrester*, *supra*, 484 U.S. at 225-26. As the *Bradley* court wrote, while assessing the judicial function of a judge in disbarring a lawyer for complaining to that judge about his treatment from the bench without notice of any kind:

> "[T]his erroneous manner in which [the court's] jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever. . ." *Bradley*, *supra*, 13 Wall. at 357.

This Court's most recent discussion of absolute judicial immunity set forth in *Forrester*, which holds qualified immunity shall be the rule in the context of employment determinations within a judge's authority, makes it clear that it is the function the judge exercised which determines whether he is entitled to absolute immunity. *Forrester*, *supra*, 484 U.S. at 227. Likewise, *Forrester* instructs that judges have absolute immunity for the "paradigmatic" judicial acts involved in resolving

disputes before them and in that context the doctrine is not controversial. *Id.* While some acts within the authority of a judge may be non-judicial, entitling the judge only to qualified immunity, a judge ordering police officers to bring counsel of record into court on a matter scheduled on the court's calendar cannot be characterized as non-judicial or outside the paradigmatic judicial acts involved in conducting the cases before him.

The authority relied upon by the Ninth Circuit for its decision, *Gregory v. Thompson*, 500 F.2d 59 (CA9 1974), does not support the court's conclusion. In *Gregory*, the judge came down from the bench and physically ejected a lawyer from the courtroom. *Id.* at 64-65. It is precisely the judge's personal use of physical force in *Gregory* that determines the conduct of the judge there was not a part of the court's judicial function. Review of the *Gregory* opinion and this Court's discussion of it in *Stump* both establish *Gregory* is limited to a judge's personal use of physical force and cannot be read to support the Ninth Circuit's citation of it. *Stump* refers to *Gregory* for the proposition that "the actual eviction of someone from the courtroom by use of physical force, a task normally performed by a sheriff or bailiff, was 'simply not an act of a judicial nature.' " *Stump*, *supra*, 435 U.S. at 361, n.10 (quoting *Gregory*, *supra*, 500 F.2d at 64.) The Court of Appeals' decision in this case clearly misreads both *Stump* and *Gregory*. Judge MIRELES engaged in no personal use of physical force. A judge who issues an order exercises a judicial function, an act qualitatively different from the personal use of physical force against an attorney. Orders are within a judge's jurisdiction; physical altercations are not.

Moreover, the Ninth Circuit opinion fails to acknowledge that *Gregory* recognized even a judge who personally used physical force would be entitled to qualified immunity. *Gregory*, *supra*, 500 F.2d at 64-65. In that case, *Harlow v. Fitzgerald*, 475 U.S. 800, 814 [102 S.Ct. 2727, 73 L.Ed.2d 396] (1982) requires dismissal of claims against government officers at the earliest possible stage and a close examination of WACO's allegations. Under *Harlow* and *Anderson v. Creighton*, 483 U.S. 635 [107 S.Ct. 3034, 97 L.Ed.2d 523] (1987), WACO's general conclusionary assertions that his constitutional rights were violated by the manner in which the court issued its order and his artifice of characterizing the court's conduct as "unreasonable" or "excessive," without alleging acts performed, would be insufficient to state a claim.

Judge MIRELES did what judges in California are empowered to do: ordered a peace officer to secure the presence of counsel of record in a case scheduled for hearing in his courtroom. The policies on which this Court has expressly premised the doctrine of judicial immunity are overtly threatened by the Ninth Circuit opinion. By virtue of the decision of the Court of Appeals: a judge issuing an order from the bench concerning his calendar is not performing a judicial function; may be found to have done so without jurisdiction depending upon the form of the order; and is personally subject to a civil lawsuit, if it is later determined the manner in which he made the order was inappropriate according to another judge. This result directly subjects judges to considerations of personal interest in making their decisions, requires they act with excess of caution, results in judicial timidity and interferes with judicial independence. Yet, it is precisely

because of these consequences that "this Court has not been quick to find that federal legislation was meant to diminish the traditional common law protections extended to the judicial process. *Forrester*, *supra*, 484 U.S. at 225.

II.

NO OTHER COURT OF APPEALS HAS EVER HELD THAT THE MANNER IN WHICH A JUDGE EXERCISES JUDICIAL AUTHORITY WILL DESTROY THE JUDGE'S ABSOLUTE IMMUNITY FROM SUIT UNDER § 1983; SUCH A DECISION CREATES A CONFLICT WITH OTHER CIRCUIT COURTS AND MANDATES THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The opinion of the Court of Appeals places the Ninth Circuit in conflict with the decisions of various other circuits on the issue of the relevancy of a judge's state of mind to the doctrine of judicial immunity and whether the manner in which a court exercises its jurisdiction can cause a judge to lose absolute immunity. As a result, the decision of the Ninth Circuit calls into question the decisions of this Court in *Stump* as well as *Dennis v. Sparks*, 449 U.S. 24 [101 S.Ct. 183, L.Ed.2d 185] (1980).

Gregory has been cited by numerous Federal courts. No circuit has held, as the opinion below does, that based on *Gregory* a judge may lose his absolute immunity as a consequence of the manner in which he issues an order controlling the appearance of counsel in a proceeding before him. See e.g., *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (CA1 1980); *Green v. Maraio*, 722 F.2d 1013, 1018, n.8 (CA2 1983); *Albright v. R. J. Reynolds Tobacco Co.*, 463 F.Supp. 1220, 1230 (W.D. PA 1979); *Liles v. Reagan*, 804 F.2d 493, 495 (CA8

1986). *Stump* explicitly observed, that in contradiction to the Ninth Circuit opinion below, the relevant issue in *Gregory* was an actual physical assault personally committed by the judge. *Stump*, *supra*, 435 U.S. at 361 n.10.

In the context of claims that judges participated in conspiracies, both the Fifth and Eleventh circuits have explicitly held even such an allegation as to the state of mind of a judge is inadequate to destroy the judge's absolute immunity. *Dykes v. Hosemann*, 776 F.2d 942 (CA11 1985) (en banc); *Holloway v. Walker*, 765 F.2d 517 (CA5), cert. denied, 474 U.S. 1037 [106 S.Ct. 605, 88 L.Ed.2d 583] (1985). Both of those decisions cite *Dennis v. Sparks*, 449 U.S. 24 [101 S.Ct. 183, 66 L.Ed.2d 185] (1980), a case involving an allegation of conspiracy between a judge and several other defendants, in which this Court held the judge had been properly dismissed from the conspiracy suit because of his absolute immunity. *Id.* at 27. In *Ashelman v. Pope*, 793 F.2d 1072, 1077 (CA9 1986) (en banc), the Ninth Circuit stated the "precedential strength" of the statement *Dykes* and *Holloway* relied on from *Dennis v. Sparks* was in its view "debatable." *Id.* at 1077, n.2. Like the opinion of the Ninth Circuit below this pronouncement from *Ashelman* is inconsistent with this Court's rationale in *Dennis* and *Stump*.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Ninth Circuit Court of Appeal to review its judgment and opinion in this action.

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APPENDICES

Howard WACO, Plaintiff-Appellant,

v.

Gregory BALTAD, Defendant,

Raymond Mireles, Defendant-Appellee.

No. 90-55683.

United States Court of Appeals,

Ninth Circuit.

Submitted May 15, 1991*.

Decided May 24, 1991.

Attorney sued state court judge, alleging that judge allegedly authorized the use of excessive force against attorney. The United States District Court for the Central District of California, Terry J. Hatter, Jr., J., dismissed the action for failure to state a claim, and attorney appealed. The Court of Appeals held that attorney's claim was not necessarily barred by absolute judicial immunity.

Reversed and remanded.

1. Federal Courts ⇐776

Court of Appeals reviews de novo district court's dismissal for failure to state claim.

2. Federal Civil Procedure ⇐1772

Dismissal for failure to state claim is appropriate only if plaintiff can prove no set of facts which would entitle him to relief.

* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

APPENDIX A

3. Federal Civil Procedure ⇐1829

When party moves for dismissal for failure to state claim, allegations in complaint are taken as true and are construed in light most favorable to nonmoving party.

4. Civil Rights ⇐238

Absolute judicial immunity did not necessarily bar attorney's claim against state court judge arising out of police officers' alleged use of excessive force to seize and bring attorney into judge's courtroom; attorney's allegations were sufficient to withstand motion to dismiss, as judge would not have been acting in his judicial capacity if he requested and authorized use of excessive force. 42 U.S.C.A. § 1983.

Hugh R. Manes, Los Angeles, Cal., for plaintiff-appellant.

John A. Daly and Joan E. Hewitt, Chase, Rotchford, Drukker & Bogust, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON, BRUNETTI and NELSON, Circuit Judges.

PER CURIAM:

Howard Waco, a Los Angeles County public defender, appeals th district court's dismissal of his action for damages against California Superior Court Judge Raymond Mireles for failure to state a claim. Because the district court directed entry of final judgment as to Judge Mireles pursuant to Fed.R.Civ.P. 54(b), we

have jurisdiction over Waco's appeal.[1] We reverse and remand.

[1-3] We review de novo a district court's dismissal for failure to state a claim. *Noll v. Carlson,* 809 F.2d 1446, 1447 (9th Cir.1987). Dismissal is appropriate only if the plaintiff "can prove no set of facts which would entitle him to relief." *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir.1986), *cert. denied*, 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987). The allegations in the complaint are taken as true and are construed in the light most favorable to the nonmoving party. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1989).

Judges are absolutely immune from section 1983 liability for damages only for their judicial acts and not for other administrative, legislative, or executive functions that they may perform. *Forrester v. White*, 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555 (1988). An act is judicial when it is a "function normally performed by a judge [and the parties] dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 360, 98 S.Ct. 1099, 1106, 55 L.Ed.2d 331 (1978); *accord Ashelman v. Pope,* 793 F.2d 1072, 1075-76 (9th Cir.1986) (en banc).

Absolute immunity protects judges from liability for their judicial acts "even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump,* 435 U.S. at 356, 98 S.Ct. at 1104. If the act is judicial, judges are subject to liability only when they act in th clear absence of all jurisdiction. *Id.* at 356-57, 98 S.Ct. at 1105.

In this complaint, Waco alleged that after he failed to appear for the initial call of Judge Mireles's morning

[1] Waco's action against police officers Baltad and Titiriga is still pending in district court.

calendar, the judge, "angered by the absence of attorneys from his courtroom . . . ordered [two police officers employed by the City of Los Angeles] . . . to forcibly and with excessive force seize and bring" Waco into his courtroom. The police officers allegedly went into another courtroom, where Waco was representing another client, and forcibly dragged him out of that courtroom. Waco further alleges that the police officers slammed him into the walls, shouted obscenities at him, and slammed him through the doors into Judge Mireles's courtroom.[2]

In support of his argument that Mireles's act was not judicial, Waco cites *Gregory v. Thompson,* 500 F.2d 59 (9th Cir.1974). In *Gregory*, this court held that when judges themselves use physical force to preserve order, they are not entitled to absolute immunity, although they may be entitled to a defense of qualified immunity. 500 F.2d at 61; 64-65 (judge asked person to leave his courtroom and, after person refused, judge physically removed him). Although the *Gregory* judge would have retained his absolute immunity if he had directed a sheriff to remove the person, he lost his immunity because he performed an act "similar to that normally performed by a sheriff or bailiff." *Id.* at 65. This court suggested that a judge also could lose his immunity if he directed a sheriff or bailiff to use excessive force. *Id.* at 65 n. 6 (dictum); *accord Ammons v. Baldwin*, 705 F.2d 1445, 1448 (5th Cir.1983) (judge's threat to use physical force on litigant "strays too far from th normal conduct of a judge to enjoy immunity") (citing *Gregory*, 500 F.2d

[2] In his complaint, Waco states that the defendants knew or should have known that his only case before Judge Mireles involved a client, Johnny Lee Smith, who was in the custody of the Sheriff's Department. According to Waco, the Sheriff's Department had failed to bring Smith to court that morning and was unable to deliver him until 1:30 p.m.

at 64), *cert. denied*, 465 U.S. 1006, 104 S.Ct. 999, 79 L.Ed.2d 232 (1984); *see also Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 566 (9th Cir.1990) (cites *Gregory* as an example of when a judge's conduct is not a judicial act), *cert. denied,* ___ U.S. ___, 111 S.Ct. 963, 112 L.Ed.2d 1050 (1991).

[4] Judges Mireles would retain his absolute immunity if he merely directed the officers to bring Waco to his courtroom without directing them to use excessive force. *Gregory*, 500 F.2d at 64-65 & n. 6. Here, however, Waco alleges that the judge "ordered [the police officers] to forcibly and with excessive force" bring Waco into his courtroom. If Judge Mireles requested and authorized the use of excessive force, then he would not be acting in his judicial capacity. *Id.* Taking the allegations in Waco's complaint as true, we cannot say that he can prove no set of facts in support of his claim. *See Love*, 915 F.2d at 1245; *Gibson*, 781 F.2d at 1337. Accordingly, we reverse the judgment of the district court.

Reversed and remanded.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOWARD WACO, Plaintiff, vs. GREGORY BALTAD, Ser. #23330, individually and as a police officer; NICHOLAS TITIRIGA, Ser. #22146, individually and as a police officer; RAYMOND MIRELES, individually, Defendants.	CASE NO. 89 6970 TJH(JRx) COMPLAINT FOR DAMAGES (Title 42 U.S.C. §1983) Violation of Federal Civil Rights PLAINTIFF DEMANDS A JURY TRIAL

Plaintiff alleges:

JURISDICTION

1. This cause of action is brought by plaintiff under Title 42 U.S.C. §1983 for redress of a deprivation under color of law of a right, privilege or immunity secured to plaintiff by the Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1343(a)(4).

PARTIES

3. Plaintiff is a citizen of the United States, and a resident of the County of Los Angeles, State of California.

At all times herein mentioned plaintiff was and still is an attorney duly licensed to practice law in all the Courts of the State of California, and is and for the past twenty-four years he has been a public defender, and at all times herein mentioned he was assigned to the Criminal Courts in Van Nuys, California.

4. At all times herein mentioned defendants GREGORY BALTAD, Ser. #23330 and NICHOLAS TITIRIGA, Ser. #22146, were each duly appointed, qualified and acting police officers duly employed as such by the City of Los Angeles; and at all times herein mentioned each said defendant was acting in the course and scope of such employment and under color of state law, and as the employee, agent and representative of every other defendant herein.

5. At all times herein mentioned defendant RAYMOND MIRELES was a duly appointed, qualified and acting judge of the Superior Court of the State of California for the County of Los Angeles, duly assigned to and presiding in Department Northwest "T" of said Court, in Van Nuys, California; and at all times herein mentioned said defendant was acting under color of state law, and as the employee, agent and representative of every other defendant herein.

VIOLATION OF FEDERAL CIVIL RIGHTS

6. The acts, omissions and events herein complained of occurred on or about November 6, 1989, between about 9:30 A.M. and 10:00 A.M., on the seventh floor of the Superior Court building at 6230 Sylmar Avenue, in Van Nuys, California.

7. At about the aforementioned date, time and place, defendants each knowingly and wilfully, and under color of state law, conspired and agreed to and pursuant thereto each defendant did knowingly and wilfully and under color of state law deprive plaintiff of rights, privileges and immunities secured to him by the Fourth, Sixth and Fourteenth Amendments to the United States Constitution, by knowingly and wilfully and under color of law engaging in the following acts and omissions, to wit:

a) Defendant MIRELES, angered by the absence of attorneys from his courtroom at the initial call of his morning calendar, and acting without probable cause nor upon information supported by oath or affirmation, ordered defendants BALTAD and TITIRIGA to forcibly and with excessive force seize and bring plaintiff into his courtroom, although as defendants each knew or in the exercise of due care they each should have known, plaintiff's only case in that court that morning involved a client, Johnny Lee Smith, who was in the custody of the Sheriff's Department, which had failed to bring Smith to court that morning, and would be unable to do so before 1:30 P.M., if then, thereby rendering impossible any substantive proceedings in said Court affecting Smith's interests before that time.

b) At about the time said seizure order was given by defendant MIRELES, and was executed by defendants BALTAD and TITIRIGA, plaintiff—as defendants each at all times knew or in the exercise of due care should have known—was then and there actively representing and appearing for another client, who was present in court, on a warrant matter in Department "M," at the other end of the hall, wherein Judge Alan Haber was then presiding, and which court was then in session.

c) Pursuant to said order of defendant MIRELES, defendants BALTAD and TITIRIGA, who were witnesses in plaintiff's said Smith case, entered Department M, and while that Court was in session, and while plaintiff was waiting to appear before said Court on said warrant matter which the Court intended to address momentarily, said defendants BALTAD and TITIRIGA, without a warrant or lawful authority, as they each knew or in the exercise of due care should have known, did then and there by means of unreasonable force and violence seize plaintiff and remove him backwards from Department M, down the hall, cursing plaintiff and calling him vulgar and offensive names; then, said defendant officers deliberately, recklessly and without necessity slammed plaintiff violently against and through the doors to Department "T," and intentionally and without necessity through the swinging gates within said Courtroom, all in the presence and view of defendant MIRELES, who thereafter knowingly and deliberately approved and ratified each of the aforedescribed acts of said defendant officers.

DAMAGES

8. By reason of the aforedescribed acts of defendants, and each of them, plaintiff sustained great bodily injury, pain and suffering, shock to his nervous system, a huge and painful bruise and abrasion to his lower left leg, pain, abrasions and contusions to his back, arms, shoulders and body, great anxiety, mental anguish, torment, humiliation, embarrassment, severe emotional distress, loss and diminution of sleep and appetite, and impairment of his professional and personal dignity, prestige and standing, and by reason of the foregoing, plaintiff sustained general damages in the sum of $250,000.

9. By reason of the aforedescribed acts and omissions of defendants and each of them, plaintiff was and, on information and belief, he will in the future be required to receive medical care and treatment, and by reason thereof he has incurred and will in the future incur hospital, doctor, x-ray, medical, pharmaceutical, therapy, and incidental expense, all to his damage in an amount as proved.

10. By reason of the aforedescribed acts and omissions of defendants and each of them, plaintiff lost and will in the future be required to lose time from work and from his professional duties, and by reason thereof he sustained and will sustain in the future a loss of earnings and earning capacity in an amount as proved.

11. The aforedescribed acts of each defendant was done knowingly, deliberately, maliciously and in reckless disregard of plaintiff's civil rights and liberty, and to oppress, injure and harass him; and by reason thereof, defendants BALTAD and TITIRIGA should be required to pay plaintiff punitive and exemplary damages in the sum of $25,000 each; and defendant MIRELES should be required to pay plaintiff punitive and exemplary damages in the sum of $100,000.

12. By reason of the aforedescribed acts and omissions of defendants and each of them, plaintiff was required to retain the services of an attorney to prosecute this action to vindicate the aforedescribed abridgement of his constitutional and civil rights; and he therefore requests that defendants be required to pay plaintiff and his attorneys reasonable attorney's fees and costs incurred herein.

WHEREFORE, plaintiff prays for judgment against defendants and each of them as follows;

1. General damages in the sum of $250,000;

2. Medical and incidental expenses in an amount as proved;

3. Loss of earnings in an amount as proved;

4. Punitive and exemplary damages against and from defendants BALTAD and TITIRIGA in the sum of $25,000 each;

5. Punitive and exemplary damages against and from defendant MIRELES in the sum of $100,000;

6. Costs of this litigation;

7. Reasonable attorney's fees;

8. Such other and further relief as the Court deems appropriate and just.

DATED: November 28, 1989

MANES & WATSON

By _____
HUGH R. MANES
Attorneys for plaintiff

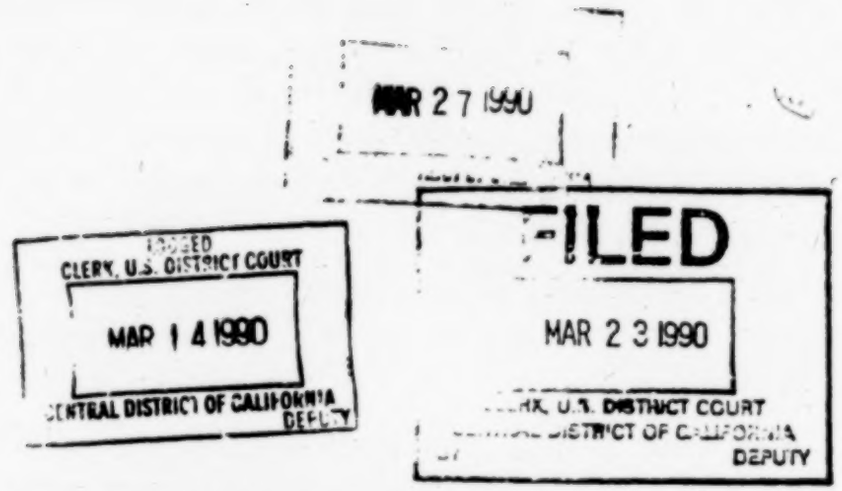
JURY DEMAND

Plaintiff demands a jury trial.

DATED: November 28, 1989

MANES & WATSON

By _____
HUGH R. MANES
Attorneys for plaintiff



LADELL HULET MUHLESTEIN, ESQ.
CHASE, ROTHCHFORD, DRUKKER & BOGUST
A Law Corporation
700 South Flower Street, Fifth Floor
Los Angeles, California 90017
(213) 626-8711
Attorneys for Defendant,
HONORABLE RAYMOND MIRELES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOWARD WACO, Plaintiff, vs. GREGORY BALTAD, Ser. #23330, individually and as a police officer; NICHOLAS TITIRIGA, Ser. #22146, individually and as a police officer; RAYMOND MIRELES, individually, Defendants.	CASE NO. CV 90-6970 THJ (Jrx) ORDER OF DISMISSAL (PROPOSED)

APPENDIX C

This matter having come before the Court on February 26, 1990, upon the motion of Defendant, Honorable Raymond Mireles, to dismiss Plaintiff's Complaint, pursuant to Federal Rules of Civil Procedure, Rule 12(b)(1) and (6), before the Honorable Terry J. Hatter, Jr., Judge Presiding; and

The Court having considered the moving papers and written opposition thereto, as well as oral argument; and

The Court having determined that Plaintiff's Complaint, however liberally construed, fails to state a claim upon which relief can be granted;

THEREFORE, IT IS HEREBY ORDERED that the Complaint of Plaintiff Howard C. Waco be and is dismissed against Defendant, Honorable Raymond Mireles.

DATED: March 23, 1990

TERRY J. HATTER, JR.

Judge Terry J. Hatter
United States District Court

Prepared by:

CHASE, ROTCHFORD, DRUKKER & BOGUST
A Law Corporation

By: Ladell H. Muhlestein
LADELL HULET MUHLESTEIN
Attorneys for Defendant,
Honorable Raymond Mireles

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 700 South Flower Street, 5th Floor, Los Angeles, California 90017.

On March 13, 19 90, I served the foregoing document described as ORDER OF DISMISSAL (PROPOSED) on plaintiff's counsel in this action by placing a true copy thereof enclosed in a sealed envelop with postage hereon fully prepaid in the United States mail at Los Angeles, California addressed as follows:

Hugh R. Manes, Esq.
MANES & WATSON
3600 Wilshire Boulevard
Suite 1710
Los Angeles, California 90010

Executed on March 13, 19 90 at Los Angeles, California.
(check applicable paragraph below)

☐ (State) I declare under penalty of perjury that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

(Signature)
MARGARITA G. TRIMOR

HUGH R. MANES
MANES & WATSON
3600 Wilshire Boulevard
Suite 1710
Los Angeles, California 90010
Telephone: (213) 381-7793

Attorneys for plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOWARD WACO, Plaintiff, vs. GREGORY BALTAD, etc., et al., Defendants.	CASE NO. CV 89-6970 TJH (Jrx) ORDER OF DISMISSAL AND FOR ENTRY OF FINAL JUDGMENT (F.R.Civ.P., Rules 54(b) and 12(b)(1) and (6)).

This matter having come before the Court on February 26, 1990, upon the motion of Defendant, Honorable RAYMOND MIRELES, to dismiss Plaintiff's Complaint, pursuant to Federal Rules of Civil Procedure, Rule

APPENDIX D

12(b)(1) and (6), before the Honorable Terry J. Hatter, Jr., Judge Presiding; and

The Court having considered the moving papers and written opposition thereto, as well as oral argument; and

The Court having determined that Plaintiff's Complaint, however liberally construed, fails to state a claim upon which relief can be granted;

THEREFORE, IT IS HEREBY ORDERED that the Complaint herein be and it is dismissed as against Defendant RAYMOND MIRELES—and him only.

The Court has determined that this order should be entered as a final judgment in that the ultimate determination of the remainder of the case in the trial court against Defendants GREGORY BALTAD and NICHOLAS TITIRIGA involves separable issues and is likely to consume more time than the appeal from this order; and further, that an immediate appeal from this Order of Dismissal may materially advance the ultimate termination of the litigation and, in th final analysis could conserve judicial time; and further, the issue presented by the Court's ruling is one of great public interest and importance, that is, whether complete judicial immunity extends to a judge's order to a police officer, appearing in his court as a witness, to use excessive force on the defense lawyer in the case;

THEREFORE, pursuant to Rule 54(b), F.R.Civ.P.,

IT IS HEREBY ORDERED AND DIRECTED that this Order of Dismissal be entered as a Final Judgment of Dismissal as to said Defendant RAYMOND MIRELES.

DATED: APR 2 2 1990

TERRY J. HATTER, JR.

JUDGE, UNITED STATES DISTRICT COURT

PROOF OF SERVICE BY MAIL

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 3600 Wilshire Boulevard, Suite 1710, Los Angeles, California 90010.

On April 11, 1990, I served the within

ORDER OF DISMISSAL AND FOR ENTRY OF FINAL JUDGMENT

on the defendants in this action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

John Daly, Esq.
Chase, Rotchford, Drukker & Bogust
Fifth Floor
700 South Flower Street
Los Angeles, California 90017

JAMES K. KAHN, City Attorney
LINDA K. LEFKOWITZ, Supervising Attorney
DONNA WEISZ JONES, Deputy City Attorney
1800 City Hall East
200 North Main Street
Los Angeles, CA 90012

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 11, 1990, at Los Angeles, California.

SHARON BOAZ

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on August 19, 1991, I served the within ***Petition for Writ of Certiorari*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Clerk, U.S. Court of Appeals
Ninth Judicial Circuit
50 United Nations Plaza
Room 59
San Francisco, California
94102-4909
(415) 556-8011

Clerk, United States District
Court for the
Honorable Terry J. Hatter
Central District
United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 894-5276

HUGH R. MANES
MANES & WATSON
(Counsel for Howard Waco)
3600 Wilshire Boulevard
Suite 1710
Los Angeles, California 90010
(213) 381-7793

JAMES K. HAHN,
City Attorney
BLANCA Z. HADAR,
Deputy City Attorney
(Counsel for Officers Gregory
Baltad and Nicholas Titiriga)
1800 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-5408

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 19, 1991, at Los Angeles, California.

Betty J. Malloy
(Original signed)